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No. 92-2058

In the Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., ET AL., PETITIONERS

v.

GRANT T. NORRIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

WILLIAM KANTER
MARC RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether respondent's state tort action alleging that he was dismissed from employment as an airline mechanic because he reported safety violations is barred by 45 U.S.C. 153 First (i) and 184, which make the Railway Labor Act arbitration procedures the exclusive remedy for certain employment disputes.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Hawaiian Airlines, Inc. (HAL), employed respondent as an aircraft mechanic. Respondent's license, issued by the Federal Aviation Administration (FAA), authorized him to approve an aircraft for service after making, supervising, or inspecting repairs. He was not authorized to approve for service any aircraft whose repairs did not conform to applicable federal regulations. A mechanic who makes a fraudulent entry in any record or report required by those regulations may have his license suspended or revoked by the FAA. Pet. App. 7a.

During a routine inspection on July 15, 1987, respondent noticed that one of the tires on an HAL DC-9 was worn. After removing the tire and bearing, he and the other mechanics noticed that the axle sleeve, which is

normally mirror-smooth, was scarred and grooved. Although respondent and the other mechanics believed that the axle sleeve was therefore unsafe and in need of replacement, respondent's supervisor, Justin Culahara, ordered the mechanics to sand the sleeve by hand and put a new bearing and tire over it. After the specified repairs were performed, the plane made its scheduled flight. Pet. App. 7a.

At the end of respondent's shift, Culahara directed him to sign the maintenance record for the installation of the tire. Under applicable federal regulations (14 C.F.R. 43.9(a)), that record served to certify whether the repair work had been satisfactorily performed. Respondent refused to sign the form on the ground that the sleeve remained unsafe. He indicated that he would sign the form only if the DC-9 manual indicated that the axle sleeve was in satisfactory condition. Culahara told respondent he would be discharged if he did not sign. When respondent persisted in his refusal, he was immediately suspended pending a termination hearing. Respondent returned home and reported to the FAA that there was a problem with an HAL aircraft that he had serviced. Pet. App. 7a-8a.

On August 3, 1987, respondent was terminated for insubordination.[1] Respondent invoked the grievance procedures available under the applicable collective bargaining agreement. The agreement provides that an employee may be discharged only for "just cause" and may not be disciplined for refusing to perform work in violation of a health or safety law. Pet. App. 8a. The grievance process proceeded to "Step 3," which entails a hearing before the head of the department in which the employee works.

[1] After respondent was terminated, he gave the FAA details of what had occurred on July 15, 1987. The FAA seized the axle sleeve on August 4, 1987, and initiated an investigation to determine how long the damaged sleeve had been on the plane. The FAA later broadened its investigation to other planes in the HAL fleet. Pet. App. 8a. On March 2, 1988, the FAA proposed a civil penalty regarding the damaged sleeve. The FAA and HAL subsequently settled the case. Pet. 4.

Id. at 9a & n.6, 51a. Prior to the hearing, however, HAL offered to reduce the punishment to suspension without pay for six weeks. Respondent never replied to the offer. *Id.* at 9a.

2. a. This case is a consolidation of two lawsuits relating to respondent's discharge. On December 8, 1987, respondent filed an action in state court against HAL. *Norris* v. *Hawaiian Airlines, Inc.*, Civ. No. 87-3984-12 (Haw. Cir. Ct.). He alleged that HAL discharged him in violation of the public policy expressed in the Federal Aviation Act and implementing regulations (Count I); that HAL's actions violated the Hawaii Whistleblower's Protection Act (HWPA), Haw. Rev. Stat. §§ 378-61 to 378-69 (1988) (Count II);[2] that HAL intentionally inflicted emotional distress on him (Count III); that HAL engaged in outrageous conduct, entitling respondent to punitive damages (Count IV); and that HAL breached the collective bargaining agreement (Count V). 12/8/87 Complaint ¶¶ 22, 28, 31, 33, 39.

HAL removed the case to the United States District Court for the District of Hawaii. On March 28, 1988, the district court dismissed Count V, holding that it was subject to the exclusive arbitral procedures of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and therefore preempted. 3/28/88 Dist. Ct. Order 14-15. The court remanded the remainder of the claims to the state trial court. *Id.* at 16-17; Pet. App. 9a n.7.

[2] The Hawaii Whistleblower's Protection Act provides in pertinent part that an employer "shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because * * * [t]he employee * * * reports or is about to report to a public body * * * a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." Haw. Rev. Stat. § 378-62(1) (1988). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. Haw. Rev. Stat. § 378-63(a) (1988).

On December 5, 1990, the state trial court dismissed Count I of the complaint against HAL, reasoning that it lacked subject matter jurisdiction because respondent's claim was preempted by the RLA. See Pet. App. 28a; 12/5/90 Haw. Cir. Ct. Order 2. The court certified its order as final under state rules of civil procedure (Haw. R. Civ. P. 54(b)) so that respondent could take an immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2.[3]

b. On September 20, 1989, respondent filed suit against petitioners Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, all of whom where officers of HAL when respondent was discharged. *Norris* v. *Finazzo,* Civ. No. 89-2094-09 (Haw. Cir. Ct.). Respondent alleged that the individual petitioners directed, confirmed, or ratified the alleged retaliatory discharge. He again sought relief on theories of discharge in violation of public policy (Count I); violation of the HWPA (Count II); intentional infliction of emotional distress (Count III); and outrageous conduct entitling him to punitive damages (Count IV). 9/20/89 Complaint ¶¶ 22, 28, 31, 33. On December 5, 1990, the state trial court dismissed Counts I and II and certified the case for immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2-3.

3. The Supreme Court of Hawaii reversed in both cases. Pet. App. 1a-26a (*Finazzo*); *id.* at 27a-29a (*Hawaiian Airlines, Inc.*). The court first observed that respondent's retaliatory discharge claims are subject to the RLA's exclusive arbitral mechanism (and are therefore preempted) if they are "minor disputes" for purposes of the RLA—*i.e.*, if they are disputes "growing out of grievances or out of the interpretation or application of agree-

[3] Although the Hawaii Supreme Court vacated the initial state trial court's order because the district court's remand order was not part of the record (Pet. App. 9a n.7), the remand order was subsequently made part of the record, the judgment of dismissal was reinstated, and petitioner took a fresh appeal from that judgment. *Id.* at 28a.

ments concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)). See Pet. App. 12a. The court concluded that respondent's claims are not preempted under that standard.

Relying on this Court's decision in *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n,* 491 U.S. 299, 305 (1989) (*Conrail*), the state supreme court explained that "minor disputes" are "those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.'" Pet. App. 14a. In the court's view, respondent's retaliatory discharge claims could not be resolved in that way: "[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the [collective bargaining] agreement nor do they point to any part of the [contract that] demonstrates that the carrier and union have agreed on standards relevant to [respondent's] situation." Pet. App. 19a.

The court rejected petitioners' argument that the retaliatory discharge claims were preempted because it was necessary to construe the collective bargaining agreement to determine whether HAL had terminated respondent for insubordination, and thus for "just cause." Pet. App. 18a-19a. The court emphasized that in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, this Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Pet. App. 15a-16a. The Supreme Court of Hawaii determined that, as in *Lingle,* the claims in this case do not turn upon an interpretation of the labor contract, but

upon "purely factual questions [that] pertain[] to the conduct of the employee and the conduct and motivation of the employer." Pet. App. 19a (quoting *Lingle*, 486 U.S. at 407).

DISCUSSION

In our view, the court below correctly held that respondent's claims are not "minor disputes" subject to the RLA's exclusive system of arbitration. This Court has held that the distinguishing feature of a minor dispute is that it may be conclusively resolved by construing the collective bargaining agreement. Respondent's claims for retaliatory discharge turn on purely factual questions concerning his conduct and petitioners' motivation in terminating respondent's employment; the claims do not require resolution of the issue whether the airline had just cause under the collective bargaining agreement to dismiss respondent. For that reason, respondent was not required to resort to the exclusive arbitral mechanism of the RLA, and the state law providing him with a cause of action for retaliatory discharge is not preempted by the RLA.

There is, however, a conflict among the circuits on the question whether a state tort claim of retaliatory discharge is preempted when the employer asserts that the discharge was justified by a term of the collective bargaining agreement. Further review is therefore warranted to resolve that important and recurring issue.[4]

[4] Respondent argues (Br. in Opp. 1-4) that the state supreme court's judgment in this case is not a "final judgment" within the meaning of 28 U.S.C. 1257(a). Although the state supreme court's judgment contemplates further proceedings in the trial court, it nevertheless is final for purposes of Section 1257(a) because "it finally disposed of the federal preemption issue" as to the claims brought before the state supreme court. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983). Moreover, if the RLA requires the claims at issue here to be determined through arbitration under the Act, permitting the case to go forward in state court would risk eroding the federal policy of the RLA. *Id.* at 497-498 n.5; see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984). That conclusion, moreover, is unaffected by the fact that this Court may ultimately find that the state supreme court correctly determined that petitioner's claims are not preempted by the RLA. *Belknap*, 463 U.S. at 498 n.5 (the fact "[t]hat we affirm rather than reverse, thereby holding that federal policy would not be subverted by the [state court] proceedings, is not tantamount to a holding that we are without power to render such a judgment").

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5); see 45 U.S.C. 153 First (i) (establishing arbitral mechanism for such disputes); 45 U.S.C. 184 (arbitral provision for such disputes in airline industry).[5] In resolving those so-called "minor disputes" (*Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on rehearing, 327 U.S. 661 (1946)),[6] the RLA first requires the parties to resort to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557, 563 (1987); see 45 U.S.C. 153 First (i), 184. If a dispute cannot be resolved internally, either party may then refer it to "arbitration

[5] Such disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934).

[6] This Court adopted the "major/minor" dispute terminology "from the vocabulary of rail management and rail labor." *Conrail*, 491 U.S. at 302. The term "major dispute" refers to "disputes over the formation of collective agreements or efforts to secure them." *Burley*, 325 U.S. at 723. In the case of a "major dispute," the RLA requires the parties "to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302; see 45 U.S.C. 155, 156; see generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Petitioners do not argue that the claims in this case constitute "major disputes."

before the National Railroad Adjustment Board * * * or before an adjustment board established by the employer and the unions representing the employees." *Conrail*, 491 U.S. at 303-304; see 45 U.S.C. 153 First (i), Second.

The submission of a dispute to arbitration is compulsory at the request of either party. 45 U.S.C. 153 First (i), Second; see 45 U.S.C. 184; see also, *e.g.*, *Conrail*, 491 U.S. at 303; *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966). The decision of an adjustment board is "final and binding." 45 U.S.C. 153 First (m), Second; see *Conrail*, 491 U.S. at 303.[7]

2. Petitioners argue (Pet. 13-15) that respondent's tort claims of retaliatory discharge should not have been adjudicated outside the arbitral process. In our view, the state supreme court correctly determined that respondent's claims—alleging that he had been discharged in violation of the public policy of the Federal Aviation Act and its implementing regulations and of the HWPA—are not minor disputes subject to the exclusive arbitral mechanism of the RLA.

a. The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*. In that case, the Court addressed whether a dispute about the carrier's implementation of an employee drug testing program was a "major dispute" concerning

[7] A similar scheme exists for the airline industry, to which Congress extended the RLA in 1936. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; see 45 U.S.C. 181-188; *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 685 (1963) (the purpose of the 1936 legislation was "to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry"). The principal difference, which is not material here, is that no national adjustment board has been established for airlines; hence, minor disputes are adjudicated exclusively by system adjustment boards formed by the airlines and the unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4; *Central Airlines*, 372 U.S. at 686.

a change in the collective bargaining agreement (which is subject to a RLA's bargaining and mediation provisions) or a "minor dispute" (which is subject to compulsory arbitration).

In holding that the controversy at issue was a minor dispute, the Court in *Conrail* looked "to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.* The Court made plain, moreover, that a party may not trigger the RLA's exclusive arbitral framework merely by asserting a contractual right based on "insubstantial grounds." *Id.* at 306. Rather, when "an employer asserts a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

b. The state supreme court's holding (Pet. App. 10a-20a) that respondent's tort claims for retaliatory discharge are not minor disputes is supported by *Conrail*, because those claims cannot be "conclusively resolved" (491 U.S. at 305) by interpreting the collective bargaining agreement.

Respondent's first claim—alleging retaliatory discharge in violation of public policy—requires proof that the termination of an employee "violate[d] a clear mandate of public policy." Pet. App. 20a-21a. As the Supreme Court of Hawaii explained, if HAL dismissed respondent in order to punish him for trying to rectify an alleged safety infraction, that action would violate the policy "of the Federal Aviation Act and [implementing regulations] to protect the public from shoddy repair and maintenance practices." *Id.* at 21a. Respondent's second claim, which arises under the HWPA, also does not depend on the

collective bargaining agreement; it merely requires proof that HAL discharged respondent because he reported the safety infraction to the FAA. *Id.* at 21a-22a.

Accordingly, as the state supreme court explained, the tort claim in this case turned on a factual dispute about whether HAL terminated respondent based on an impermissible motive, *i.e.*, because he engaged in conduct protected by state tort law independent of any contract rights of respondent or HAL. Because a collective bargaining agreement cannot eliminate substantive legal protections provided to employees independent of the agreement (see *Buell*, 480 U.S. at 563-565; *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963); cf. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211-212 (1985) (LMRA)), the tort claims in this case could not be resolved by adjudicating the distinct legal question whether there was "just cause" for respondent's discharge under the labor contract. See Pet. App. 19a. Respondent could not prevail on his tort claims merely by proving that petitioner lacked just cause to dismiss him under the collective bargaining agreement, because the torts alleged required proof of unlawful purpose to punish respondent for reporting safety violations to the FAA.[8] Conversely, even if the state court were to find that respondent committed insubordination under the labor contract by refusing "to sign work records in connection with the work he performs" (Pet. App. 49a (Art. IV ¶ D.4(a)), that finding could not "arguably justif[y]" (*Conrail*, 491 U.S. at 307) a discharge motivated by the desire to penalize respondent for reporting a safety infraction. In other words, as the court below concluded, this case does not present a minor dispute because "[respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement." Pet. App. 19a.

[8] Petitioners contend (Pet. 14) that the collective bargaining agreement is implicated by those claims because it provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state, or federal health and safety law shall not warrant disciplinary action." Pet. App. 60a-61a (Art. XVII ¶ F). As we explain below, that claim is not preempted merely because a similar claim could also have been handled through the grievance mechanism of the RLA. See pp. 11-13, *infra*.

c. Petitioners contend that the state supreme court's analysis is insufficiently protective of the RLA's exclusive arbitral mechanism. Because the "minor dispute" mechanism of the RLA applies to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)), petitioners argue, in effect, that a claim is preempted whenever an employer describes the factual dispute in the legal terms of the collective bargaining agreement or when the employer's conduct is or could be contested through the grievance mechanism of the contract. Pet. 13-15. That argument misconceives the statutory scheme.

i. Petitioners' broad interpretation of the RLA is inconsistent with this Court's decision in *Conrail*. There, the Court held that a minor dispute is one that may be "conclusively resolved" under the collective bargaining agreement. 491 U.S. at 305. The Court stressed, however, that a dispute may not be subject to arbitration as a minor dispute if the contract claim is insubstantial—that is, if the conduct is not even "arguably justified" under the contract. *Id.* at 306-307.

Although petitioners argue that HAL's conduct was "arguably justified" by the provision of the collective bargaining agreement requiring mechanics to sign off on work records for completed repairs, respondent would not be required to dispute that issue in this suit. As set forth above (pp. 9-10, *supra*), that issue under the collective bargaining agreement could not "conclusively

resolve" respondents' tort claims, which turn on the factual question of whether HAL terminated respondent because he reported a safety violation to the FAA.

ii. Given the breadth of the subject matter covered by a typical collective bargaining agreement,[9] petitioners' construction of the RLA would result in an unduly broad preemption of state tort law, in contravention of this Court's precedents. Because "the text of the RLA does not mention * * * tort liability" (*Buell*, 480 U.S. at 562), it does not preempt States from adopting minimum duties through their law of torts, even if those duties relate to employment relationships covered by the RLA. That conclusion is made clear by this Court's decision in *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc., supra.* There, the Court rejected the contention that the RLA preempted a state statute "protecting employees against racial discrimination." 372 U.S. at 724. As this Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that it did not preempt the state anti-discrimination statute at issue. *Ibid.*

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[9] A collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. *The collective agreement covers the whole employment relationship.* It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (citation omitted; emphsis added); accord, *Conrail*, 491 U.S. at 311-312 (a collective bargaining agreement must "govern a myriad of cases which the draftsmen cannot wholly anticipate," and its express terms are necessarily supplemented by "practice, usage and custom"). For that reason, a vast array of injuries sustained by railroad workers could theoretically be addressed by "the timely invocation of the grievance machinery." *Buell*, 480 U.S. at 564.

In light of *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised on state-law duties in areas of legitimate state concern that are independent of duties assumed under the collective bargaining agreement. Otherwise, either state regulation would be substantially displaced, or arbitrators would be required to adjudicate issues of state tort law. Neither result is consistent with this Court's cases governing the regulation of labor relations. See, *e.g., Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21, 23 (1987) ("pre-emption should not be lightly inferred," because "the establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Lueck*, 471 U.S. at 212 (avoiding construction of labor statute that "would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored"); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (arbitrators exceed their authority if they premise their decisions on a source of law outside the collective bargaining agreement).[10]

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[10] To be sure, in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (Pet. 13 n.4), this Court held that an individual may contract to submit certain statutory claims to binding arbitration. However, even if the parties to the collective bargaining agreement in this case had agreed to the arbitration of state tort claims, *Gilmer* would not apply here. The Court in *Gilmer* emphasized the difference between arbitration agreements in individual contracts and those in collective bargaining agreements. As the Court explained, where arbitration "occur[s] in the context of a collective-bargaining agreement, the claimants [are] represented by their unions in the arbitration proceedings," and there is "tension between collective representation and individual statutory rights." *Id.* at 1657. *Gilmer* therefore does not undercut the analysis of *Alexander* v. *Gardner-Denver Co., supra*, which held that the availability of arbitration under a collective bargaining agreement did not bar an individual employee from asserting personal statutory rights in court.

3. Petitioners contend (Pet. 8-9) that the Supreme Court of Hawaii erred in relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, *supra*, a case arising under Section 301(a) of the LMRA, 29 U.S.C. 185(a). In our view, however, *Lingle* supplies an appropriate analogy in this case.

Section 301(a) of the LMRA authorizes federal jurisdiction of "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a).[11] The Court in *Lingle* held that Section 301 did not preempt a state tort suit based on a retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state-law cause of action consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing of a worker's compensation claim, the Court concluded:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

[11] Under this Court's cases, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, this Court addressed the extent to which preemption under Section 301 extends to tort claims arising out of the employment relationship.

486 U.S. at 407. Thus, the Court found that the state tort was " 'independent' of the collective-bargaining agreement" because its resolution did "not *require* construing [that] * * * agreement." *Ibid.* (emphasis added).

To be sure, the standard for preemption under *Lingle* (whether a state law claim requires the interpretation of a labor contract) is articulated somewhat differently from the standard for finding a minor dispute under *Conrail* (whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement). It is also true that the RLA, unlike the LMRA, affirmatively calls for the arbitration of contract claims within its sweep.[12] Nevertheless, *Lingle* is instructive in the RLA context, because its analysis addresses a question common to both statutes: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Compare, *e.g.*, *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements"), and *Lueck*, 471 U.S. at 212 (because LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," "it would be inconsistent with

[12] This distinction between the RLA and the LMRA should not be overstated. In determining when a state tort action is preempted under Section 301, this Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219. The Court noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas Flour*," and that the standard for preemption under Section 301 must protect the parties' "federal right to decide who is to resolve contract disputes." 471 U.S. at 219. Thus, although RLA preemption protects a direct statutory right to arbitration, LMRA preemption protects the important statutory right to contract for an arbitral remedy.

congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract"), with *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law). Accordingly, while it is unclear whether the standards set forth in *Lingle* and *Conrail* would lead to the same result in every case, we believe that the Supreme Court of Hawaii properly consulted the policies underlying *Lingle* in defining the line between federal contract claims and tort claims in this case.

4. As petitioners point out (Pet. 10-12, 15-16), there is disagreement among the federal (and state) courts over whether *Lingle* should be applied in RLA cases.[13] Certiorari would not necessarily be warranted in this case on that ground alone. The state supreme court's decision was correct under both *Lingle* and *Conrail*, and the Court therefore could resolve this case without considering the practical differences (if any) that may distinguish the *Lingle* and *Conrail* tests.

There is, however, also a conflict among the circuits on the specific question of whether a claim of retaliatory discharge is preempted by the RLA. In the aftermath of *Lingle* and *Conrail*, most courts of appeals and state supreme courts that have addressed the issue have concluded that state tort claims for retaliatory discharge are not preempted by the RLA when the claims turn on substantive rights independent of the collective bargaining

[13] Compare, *e.g.*, *Anderson* v. *American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993) (applying *Lingle*); *Davies* v. *American Air Lines, Inc.*, 971 F.2d 463, 466-467 (10th Cir. 1992) (same), cert. denied, 113 S. Ct. 2439 (1993) (see note 16, *infra*); *O'Brien* v. *Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (same), cert. denied, 113 S. Ct. 980 (1993), and *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (same), with *Hubbard* v. *United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (because RLA preemption is broader than LMRA preemption, *Lingle* does not govern in RLA cases); and *Lorenz* v. *CSX Transportation, Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (same).

agreement. See, *e.g.*, Pet. App. 14a-24a; *Anderson* v. *American Airlines, Inc.*, 2 F.3d 590, 594-596 (5th Cir. 1993) (wrongful discharge in retaliation for seeking remedy under workers' compensation statute); *Davies* v. *American Air Lines, Inc.*, 971 F.2d 463, 465-468 (10th Cir. 1992) (wrongful discharge in violation of public policy against dismissal for union organizing activities), cert. denied, 113 S. Ct. 2439 (1993); *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (discharge for reporting safety violations).

In *Grote* v. *Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990), however, the court of appeals reached the opposite result in a case involving a claim very similar to the claims at issue here. Grote filed a state law tort action alleging that his employer wrongfully discharged him because he refused to perjure himself to the Federal Air Surgeon when seeking recertification as a commercial pilot. Although the wrongful discharge claim apparently turned on the employer's motive in terminating Grote for reasons contrary to public policy (*i.e.*, refusal to perjure himself before federal licensing authorities), the Ninth Circuit found the claim preempted.[14] Noting that a term of the collective bargaining agreement governed the airline's right to require pilots to maintain a current medical certificate, the court of appeals concluded that "the subject of Grote's claim is at least 'arguably governed' by * * * the agreement." *Id.* at 1309.[15]

Grote conflicts with the decision in this case. In contrast with the Ninth Circuit's approach in *Grote*, the state supreme court here refused to find respondent's tort

[14] The court of appeals also held that the RLA preempted Grote's claims of breach of a covenant of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, defamation, and fraud. *Grote*, 905 F.2d at 1308-1310.

[15] Finding the wrongful discharge claim preempted under the RLA, the court further held that the *Lingle* framework was of no assistance to Grote because preemption under the RLA is broader than preemption under the LMRA. *Grote*, 905 F.2d at 1309-1310.

claims preempted because a term in the collective bargaining agreement—requiring an employee to sign work records for completed repairs—arguably addressed the same circumstances giving rise to the tort claims. Pet. App. 18a-19a. And unlike the Ninth Circuit in *Grote*, the state supreme court recognized that an alleged retaliatory discharge in violation of public policy cannot "arguably [be] justified" (*Conrail*, 491 U.S. at 307) by any provision of a collective bargaining agreement, and that such tort claims turn on questions of the employer's conduct and motivation, rather than the question of just cause under the labor contract. Pet. App. 18a-19a.

Because the issue of RLA preemption recurs frequently in cases involving retaliatory discharge—and because the scope of RLA preemption determines not only the forum but the scope of available remedies in such cases—the question presented for review in this case is of substantial importance in determining the extent to which States will be able to bring their police power to bear on employment relationships covered by the RLA. We therefore believe that certiorari is warranted to resolve the circuit conflict in retaliatory discharge cases.[16] Review may also present

[16] Last Term, we suggested that certiorari should not be granted in *American Airlines, Inc.* v. *Davies*, cert. denied, 113 S. Ct. 2439 (1993) (No. 92-1077), which presented the question whether the RLA preempted a claim of retaliatory discharge for union organizing. Because the plaintiff alleged retaliation for union organizing, he had a judicially enforceable cause of action directly under the provisions of the RLA that give employees the right to organize and bargain collectively without employer interference. See 45 U.S.C. 152 Third and Fourth; *Virginian Ry.* v. *System Federation No. 40, Railway Employees*, 300 U.S. 515 (1937). In our view, that claim could be maintained only under Section 152 Third and Fourth, and not under state law. But because the airline had not raised that distinct claim of preemption, there was no basis for inferring that the Tenth Circuit would have allowed Davies' state-law claims to proceed if the employer had properly raised that distinct defense in a timely manner. Thus, there was no occasion for this Court to consider the extent to which the RLA's arbitral mechanism under

the Court with an occasion to address the propriety of reliance on *Lingle* and principles developed under Section 301 of the LMRA in resolving preemption issues under the RLA (an issue on which the lower courts have expressed differing views (see p. 16, *supra*)), and may shed light on the proper resolution of preemption issues under the RLA in contexts other than those involving allegations of retaliatory discharges.[17]

45 U.S.C. 153 First (i) and 184 preempts retaliatory discharge claims properly brought under state law. 92-1077 U.S. Br. 15-19. The Court thereafter denied certiorari in *Davies*. See 113 S. Ct. 2439 (1993). Respondent's claims in this case, by contrast, do not arise directly under the RLA.

[17] We note that the issue of RLA preemption arises frequently in a variety of contexts. For example, a number of courts of appeals have held that claims for intentional infliction of emotional distress based on wrongful discharge are preempted because the claim requires a determination of whether the employer's action was justified under the labor contract. See, *e.g.*, *Calvert* v. *Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992); *Edelman* v. *Western Airlines, Inc.*, 892 F.2d 839, 844-845 (9th Cir. 1989). And in *Capraro* v. *United Parcel Service Co.*, 993 F.2d 328, 332 (3d Cir. 1993), the court of appeals dismissed claims of fraudulent discharge, outrageous conduct, and wrongful infliction of emotional distress on the ground that "a state claim will be preempted in any instance where resolution of the claim would involve determination of an issue that an [arbitrator] might decide on the basis of interpretation of the collective bargaining agreement, either because the employee's claim or the employer's defense relies on the agreement." Although the claims at issue in this case are different, the court's approach in *Capraro* is inconsistent with the analysis of the state supreme court in this case. This Court's resolution of respondent's claims therefore may shed light on the proper approach to claims of RLA preemption in various related contexts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

WILLIAM KANTER
MARC RICHMAN
Attorneys

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